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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 703

FAR EAST CONFERENCE,

Petitioner,

—v.—

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	11
I. The Questions Presented Are Important for the Administration of the Shipping Act and of Regulatory Statutes Generally	11
II. The Court of Appeals Appears to Have Erred in Departing from Its Own Recent Decisions That §21 Orders Which Lack an Adequate Statement of Purpose Contravene Amendment IV to the Constitution of the United States	12
III. In Holding the Information Here Sought to Be Relevant to Authorized Functions of the Commission, the Court of Appeals Gave to Amended §15 of the Shipping Act an Excessively Broad Interpretation	13
IV. Regarding the Burden of Compliance with the Commission's Order	18
Conclusion	18
Appendix A—Opinion Below	1a
Appendix B—Constitutional and Statutory Provisions Involved	1b

CITATIONS

Cases: PAGE

Hellenic Lines, Ltd. v. *Federal Maritime Board*, 111 App. D.C. 151, 295 F.2d 138 (1961) 12-13

Kerr S.S. Co. v. *United States*, 284 F.2d 61 (2d Cir. 1960), certiorari granted and remanded with directions to dismiss as moot, 369 U.S. 422 (1962) 11

Montship Lines Limited v. *Federal Maritime Board*, 111 App. D.C. 160, 295 F.2d 147 (1961) 11, 18

United States v. *Tobin*, 195 F. Supp. 598 (D.C. 1961), rev'd and rehearing *en banc* denied *sub nom., Tobin* v. *United States*, 113 App. D.C. 110, 306 F. 2d 270, 274-6, cert. denied *sub nom., United States* v. *Tobin*, 371 U.S. 902 (1962) 17

Constitution and Statutes:

Amendment IV to the Constitution of the United States 3, 12

Administrative Procedure Act:

Sec. 6, 60 Stat. 240 (5 U.S.C. §1005) 3

Sec. 6(b), 60 Stat. 240 (5 U.S.C. §1005(b)).. 12

Judicial Code:

28 U.S.C. §1254 2

PAGE

Judicial Review Act (Federal Agencies):

Sec. 2, 64 Stat. 1129 (5 U.S.C. §1032) 3, 10

Sec. 4, 64 Stat. 1130 (5 U.S.C. §1034) 3, 10

Sec. 10, 64 Stat. 1132 (5 U.S.C. §1040) 2, 3

Pub. L. 87-346, 75 Stat. 762 (October 3, 1961) ..13-14

Shipping Act, 1916, as Amended:

Sec. 15, 75 Stat. 763 (46 U.S.C. §814), 3, 4, 6, 7, 13

Sec. 18(b)(1), 75 Stat. 765 (46 U.S.C. §817 (b)(1)) 4

Sec. 18(b)(5), 75 Stat. 765 (46 U.S.C. §817 (b)(5)) 8, 10

Sec. 21, 39 Stat. 736 (46 U.S.C. §820), 1, 2, 3, 4, 11, 12, 16, 17

Miscellaneous:

28 F. R. 11698 (November 1, 1963) 6-7

H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

FAR EAST CONFERENCE,

Petitioner,

—v.—

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, dated August 20, 1964, and the judgment entered thereon, affirming orders of the Federal Maritime Commission dated December 19, 1963.

We point out that Petitioner has joined with other parties to the litigation below in a petition (No. 699) to review the same decision insofar as it affirmed orders of the Federal Maritime Commission issued on the purported authority of §21 of the Shipping Act, 1916. Those orders were of like tenor and related to rate matters in foreign commerce of the United States.

The decision below, in addition, disposed of a separate petition for review of a different §21 order addressed to the present Petitioner and designated in the court below Case No. 18,518. This petition for a writ of certiorari is filed in order to assure that the granting of a writ of certiorari to review the decision of the Court of Appeals will include a review of that decision insofar as it disposed favorably to the Maritime Commission of Case No. 18,518 below.

Opinion Below

The opinion and decision of the Court of Appeals, not yet reported, is printed, *infra,* in Appendix A.

Jurisdiction

The decision of the Court of Appeals was handed down and judgment thereon entered on August 20, 1964. The jurisdiction of this Court is invoked under §10 of the Judicial Review Act (Federal Agencies), 64 Stat. 1132 (5 U.S.C. §1040), and 28 U.S.C. §1254.

Questions Presented

1. Does the Federal Maritime Commission's order seeking detailed information including both copies of correspondence between the Petitioner and all of its patrons and memoranda of oral communications between Petitioner and its patrons, reasonably relate to any matter over which the Commission has jurisdiction?

2. Does the Commission's order on the purported authority of §21 of the Shipping Act, 1916, satisfy the requirements of §6 of the Administrative Procedure Act?

3. Does the Commission's order contain a statement of purpose sufficient to permit a determination of the relevancy and reasonableness of the information sought, and, therefore, to satisfy the requirements of Amendment IV to the Constitution of the United States?

Statutes Involved

The constitutional and statutory provisions involved are: Amendment IV to the Constitution of the United States; §15 of the Shipping Act 1916, 39 Stat. 733, as amended by 75 Stat. 763 (46 U.S.C. §814); §21, Shipping Act, 1916, 39 Stat. 736 (46 U.S.C. §820); §§2, 4 and 10 of the Judicial Review Act (Federal Agencies), 64 Stat. 1129, as amended, 1130 and 1132 (5 U.S.C. §§1032, 1034 and 1040); and §6 of the Administrative Procedure Act, 60 Stat. 240 (5 U.S.C. §1005). Because these provisions are lengthy, they are set forth in Appendix B.

Statement

Petitioner (hereinafter, the "Conference") is a rate-making association of common carriers by water in the foreign commerce of the United States, operating under an agreement approved by the Federal Maritime Commission or its predecessor agencies pursuant to §15 of the Shipping Act, 1916, as amended, 75 Stat. 763 (46 U.S.C. §814).

Pursuant to this agreement the Conference establishes tariffs of ocean freight rates, which are filed with the Commision in accordance with §18(b)(1) of the Shipping Act. The member carriers undertake to assess and apply these rates on cargoes carried by them in the export trades from the United States covered by the conference agreement.

On December 27, 1963, th Federal Maritime Commission issued an order, purportedly under §21 of the Shipping Act, 1916, which was served upon the Conference (R. 3-4).[1]

The Order under review starts with a paraphrase of a small portion of §15 of the Shipping Act, 1916, as amended, 75 Stat. 763 (46 U.S.C. §814). It states that the portion of the section referred to requires that the Commission disapprove any agreement between parties subject to the Shipping Act on a finding of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints. The second paragraph of the Order contains the only statement of the Order's purpose. It is as follows:

> "In order that the Commission may be adequately informed as to matters bearing upon its responsibilities under this statutory provision, and to determine what action, if any, it should take under this provision, it is necessary that the conference named herein furnish the Commission with the information hereinafter specified."

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[1] References marked "R." are to pages of the Joint Appendix constituting the record in the court below, copies of which are being filed in this Court.

Thereupon the Order directs the Far East Conference to produce at the Commission's offices in Washington, D. C., the following:

> "1. A copy, or if oral, a complete statement of each request and/or complaint filed during the period July 1, 1963 to December 31, 1963; inclusive.
>
> "2. Copies of all interim correspondence and memoranda including all inter-office memoranda and correspondence between the conference and carriers and any report or studies pertaining to each individual request and/or complaint mentioned in Paragraph 1 above.
>
> "3. A copy, or if oral, a complete statement of each notice to shippers advising of actions taken in connection with such requests and complaints.
>
> "4. A brief resume to accompany the above setting forth the date received, the name and address of the party, the nature of the request or complaint, the date of disposition, the method of disposition, and if denied, the reason for such denial."

The concluding paragraph of the Order excuses the production of information which has otherwise been furnished to the Commission at its request.

The Order was not the first request received by the Far East Conference for approximately the same data. On October 23, 1963, the Commission had telegraphed to the Conference requesting substantially the same information, with no statement of the purpose therefor (R. 39). On October 31, 1963, the Con-

ference received from the Commission a letter confirming the telegram (R. 39-40). The letter advised that under §15, as amended, the Commission is required to survey and evaluate procedures used by conferences to insure that such procedures are adequate to afford shippers a prompt and fair hearing on their requests and complaints. This is indeed a quite different paraphrase of the language of §15 from that which ultimately appeared in the Order under review. The letter renewed the telegraphic request for data, asserting that the Commission viewed the matter "with the utmost concern" because of "Congressional concern regarding the disparity of rates in the foreign commerce of the United States and other matters pertaining thereto". Thus, the letter itself contained a second and quite inconsistent statement of purpose for the requested information. Disparity of freight rates is an expression of inexact significance. No system of common carrier tariffs involves the charging of the same rate for all transportation. In a sense, every tariff involves disparities of rates. The conditions which give rise to differences in rates for different transportation services and for different items of traffic have nothing to do with the promptness or fairness with which the carriers or conferences of carriers hear and dispose of complaints and requests from their patrons. However, the purpose of the letter was even more remote. It was not the Commission's purpose but apparently the purpose of someone or some group in Congress.

The next step in the chain of events leading to the issuance of the order occurred on November 1, 1963, when the Commission caused to be published a notice of proposed rule making (28 F.R. 11698). The pro-

posed rule referred to amended §15 of the Shipping Act and asserted the Commission's responsibility thereunder as follows:

> "(b) It is the responsibility of the Commission to see that the basic minimal requirements deemed necessary to accomplish this end are instituted and to maintain a continuing surveillance over the conferences and other rate-fixing agreements to insure that reasonable procedures are observed."

Here we find a new departure in the statement of the Commission's responsibilities under the complaints and requests provision of §15 which introduces objectives not readily apparent from a reading of the statutory language, *i. e.,* the establishment by the Commission of basic minimal requirements for reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints; nor does the statute literally oblige the Commission "to maintain a continuing surveillance over the conferences and other rate-fixing agreements to insure that reasonable procedures are observed".

Premised upon this conception of its duties, the Commission's proposed rule, after requiring all conferences, including the petitioner, to file with the Commission a statement outlining their procedures for handling shippers' requests and complaints, in §527.3, would require quarterly reports:

> "* * * covering all shippers' requests and complaints received and/or disposed of during the preceding three-month period, such report to include the following information:
>
> "(a) Date request or complaint was received.

"(b) Identity of the person or firm submitting the request or complaint.

"(c) Nature of request or complaint, i. e., rate reduction, rate establishment, classification, overcharge, undercharge, measurement, etc.

"(d) Date final action was taken and nature thereof.

"(e) If denied, the reason.

"Such report shall be accompanied by copies, or if oral, a statement setting forth complete details, of all such requests and complaints together with copies of the notices to shippers of advice as to action taken thereon. If said notice of advice as to action taken is oral, a complete statement thereof shall be filed with the Commission."

It was against this background that the §21 order under review was issued. After the current fashion (see the §21 orders involved in No. 699), the order is entitled, "Study—Conference Procedures For Hearing And Considering Shippers' Requests And Complaints".

The Far East Conference currently establishes the rates and charges of its member lines, and the rules and regulations governing their application, in connection with transportation of property from Atlantic and Gulf Coast ports of the United States to ports in Japan, Korea, Taiwan (Formosa), Siberia, Manchuria, China, Hong Kong, Vietnam, Laos and Cambodia (the territories formerly known as Indo-China), and the Republic of the Philippines. The membership of

the Conference currently includes members whose vessels fly the flags of the United States, Japan, the Republic of the Philippines, the Kingdom of Norway, and the Kingdom of Denmark.

The Far East Conference tariff contains more than 550 numbered tariff items to which thousands of articles of commerce are indexed for rate purposes. The Conference, at the times relevant to this proceeding, had contracts with over 5,000 exporters with whom it may have had correspondence or oral communications relating to rate matters (R. 44). It would require a review of all of the Conference files to determine whether they contain any communications which answer the description of the documents sought in the order. It would also require interrogation of half-a-dozen Conference employees regarding their telephonic and face-to-face conversations with shippers' representatives to determine whether any of those conversations fall within the scope of the order. Compliance would then require the copying of the documents, the preparation of memoranda of the conversations, and the preparation of an exhibit containing a detailed recapitulation of all of the foregoing.

All of this labor and disclosure of business data which are private and confidential, not only to the Conference, but to the merchants (who usually set forth highly prized pricing data in connection with their requests for rate adjustments), is required for no reason, or for a number of conflicting reasons. The most recent justification advanced for the requirement was given by the Chairman of the Commission, according to an article appearing in the New York Journal

of Commerce on Monday, January 13th, 1964, at page 28. The article states (R. 13):

> "Adm. John Harllee, chairman of the FMC, announced yesterday that 40 other conferences supplied the data, which 'is needed to answer a direct request of the joint economic committee'."

The question here really is whether the boundaries of legitimate information-gathering have become so blurred that they are no longer visible, with the result that the Commission can seek any data which it requests without any justification against which the reasonableness of its demands may be determined.

Because the consequences of compliance with the Commission's orders were of far-reaching importance, the Conference filed a petition to review in the Court of Appeals for the District of Columbia Circuit under §§2 and 4 of the Judicial Review Act (Federal Agencies), 64 Stat. 1129, 1130 (5 U.S.C. §1032 and 1034). (R. 20.) The Court of Appeals denied an application for a stay under date of April 3, 1964, and set an expedited schedule for briefing and argument. (R. 46.) The case was argued and, on August 20, 1960, the Court rendered an opinion (Appendix A) in favor of the Federal Maritime Commission, Judge Miller dissenting.

Reasons for Granting the Writ

I. The Questions Presented Are Important for the Administration of the Shipping Act and of Regulatory Statutes Generally

Viewed solely as an interpretation of the information-gathering powers of the Federal Maritime Commission under Section 21 of the Shipping Act, the decision below affects the rights of more than 400 common carriers by water serving United States foreign commerce.[2] Most of those carriers are members of one or more of the 120 steamship conferences establishing freight rates in the numerous and diverse trade routes on which that commerce flows. Their vessels fly the flags of all the principal maritime countries of the world and of many of the emerging nations seeking to establish themselves in the maritime field. The increasing extent to which the United States regulatory activity unilaterally burdens ocean-borne commerce among nations is a matter of grave concern to those carriers, to the countries where their vessels are registered, and to the nations whose foreign commerce is also the foreign commerce of the United States.

However, even broader considerations are involved. The ever-increasing scope of intervention by federal

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[2] The Section 21 orders involved in the *Montship* and *Kerr* cases were addressed to more than 400 carriers believed by the Commission's predecessor to be subject to the Shipping Act. [*Montship Lines Limited* v. *Federal Maritime Board*, 111 App. D.C. 160, 295 F.2d 147 (1961); *Kerr S.S. Co.* v. *United States*, 284 F.2d 61 (2nd Cir. 1960), certiorari granted and remanded with directions to dismiss as moot, 369 U.S. 422 (1962)].

agencies into the day-to-day activities of regulated industries is a matter of critical importance to all persons entitled to the protection afforded by the Constitution and the Administrative Procedure Act. As a consequence, there is an urgent need for further definition of the judicially enforceable limits upon the inquisitorial powers of administrative agencies.

II. The Court of Appeals Appears to Have Erred in Departing from Its Own Recent Decisions That §21 Orders Which Lack an Adequate Statement of Purpose Contravene Amendment IV to the Constitution of the United States

The opinion below treated the review of the shippers' requests and complaints order separately from the others only with respect to the contention that the information sought was irrelevant to the Commission's authorized functions. (Appendix A, pp. 11a-12a). Accordingly, for our points with respect to the questions under Amendment IV to the Constitution of the United States and §6(b) of the Administrative Procedure Act, 60 Stat. 240 (5 U.S.C. §1005(b)), we respectfully refer this Court to pp. 12-16 of the petition for a writ of certiorari filed by the Far East Conference and five Transatlantic Conferences, seeking review of the decision below as it relates to the "Foreign Trade Study" orders (No. 699).

We do point out that in *Hellenic Lines Limited* v. *Federal Maritime Board,* 111 App. D.C. 151, 295 F.2d 138 (1961), a different panel of the court below held invalid, on constitutional grounds, a §21 order of the Commission's predecessor for the reason that its state-

ment of purpose was inadequate to serve as a standard of relevancy and, hence, reasonableness. That there is no distinguishing difference between the present order and the *Hellenic Lines* order is, we submit, demonstrated by the following comparison of their respective purported statements of purpose:

The Present Order	*Hellenic Lines* Order
"In order that the Commission may be adequately informed as to matters bearing upon its responsibilities under this statutory provision, and to determine what action, if any, it should take under this provision, it is necessary that the conference named herein furnish the Commission with the information hereinafter specified."	"That pursuant to the responsibilities vested in the Board by the aforementioned Shipping Act, 1916, and in the effectuation in the public interest of the Board's regulatory duties under that Act, the Board needs the reports, accounts, records, rates, charges and memoranda of facts and transactions hereinafter described * * *."

III. In Holding the Information Here Sought to Be Relevant to Authorized Functions of the Commission, the Court of Appeals Gave to Amended §15 of the Shipping Act an Excessively Broad Interpretation

By Pub. L. 87-346, §15 of the Shipping Act was, in 1961, amended [75 Stat. 763 (46 U.S.C. §814)] by inserting the following provision among others:

> "The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it,

> or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints,"

The statutory language is as eloquent in what it omits to say as it is in what it says. It does not authorize the Commission to disapprove conference agreements because the conference has not promptly or fairly heard or considered a particular shipper's request or complaint. It does not establish a procedure which conferences must adopt and maintain for the consideration of shippers' requests and complaints. It does not direct the Commission to establish a standard procedure for conferences in the consideration of shippers' requests and complaints. The only thing that it does authorize the Commission to do is, after notice and hearing, and a finding of failure or refusal to adopt and maintain reasonable *procedures* for promptly and fairly hearing and considering shippers' requests and complaints, to disapprove the conference agreement concerned.

The legislative history of the 1961 amendments confirms that the exclusive concern was with procedures. Thus the House Merchant Marine and Fisheries Committee explained this provision on the ground that the committee's hearings "established that some conferences were devoting less than a reasonable amount of attention to the problem of their shippers, and that under the 1916 Shipping Act the shippers had incomplete recourse." H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961) 11.

If the Commission has reason to suspect that the Far East Conference has not adopted or is not main-

taining such procedures, the proper course under the statute is to give notice and conduct a hearing to determine whether the suspicion is well-founded. At the hearing, the relevant evidence would be that which demonstrated the procedures, if any, followed by the Conference. If, under the most liberal doctrine regarding administrative fact-gathering, the Commission merely wishes to satisfy itself that the Far East Conference is not violating the law, it should seek information related to the adoption and maintenance by the Conference of reasonable *procedures* relating to the hearing and consideration of shippers' requests and complaints.

The Order under review is entirely inapt for either of these sensible and proper procedures. It makes no inquiry whatsoever regarding the procedures adopted and maintained by the petitioner for hearing and considering shippers' requests and complaints. Rather, it seeks a host of minutiae in relation to specific shipper requests and complaints, both written and oral. Whatever might be the relevancy of these gleanings, if the Commission had some authority with respect to conference action on specific requests and complaints, they are of no value whatsoever in elucidating the conference procedures.

The Court of Appeals does not appear to have dealt with this contention. It merely stated (Appendix A, pp. 11a-12a) that it seems clear that, in ascertaining conference procedures for handling shippers' requests and complaints, the Commission "is entitled" to find out what requests and complaints have been made and what disposition has been made

of them. We submit that this is no answer to our argument. Even if the Commission might have some business, after ascertaining a Conference's procedure, for determining whether a particular complaint or request was handled in accordance with that procedure —a point we concede *arguendo* only—information as to specific complaints and requests and their disposition can have no purpose until the nature of the conference procedure has been ascertained. That inquiry is not advanced in the least degree by the information sought in the present order (Appendix A, pp. 12a-13a).

As we have intimated above, various Commission utterances *dehors* the Order have advanced reasons for its issuance. These vary from the need of the Commission to survey conference complaint and request procedures to expressions of congressional concern regarding rate disparities and procedures for handling shipper complaints (R. 12, 13). Even if the making of a "survey"—or a "study"—with no definite objective contemplated by the Shipping Act, were a proper justification for a §21 order, it would be defective in the present case for the reason pointed out above, namely, that the information requested does not relate to conference procedures.

If the purpose of the Order is to satisfy a congressional concern, it is a purpose not within the powers conferred upon the Commission. The Shipping Act certainly does not authorize the Commission to conduct an information-gathering circus for the edification of congressional committees and, hopefully, for the creation of an appearance of frantic regulatory activity.

If the purpose is the use of the Commission's powers under §21 as a means of obtaining from the petitioner information desired by a congressional committee, it is equally improper. The Commission is granted no power to gather information at the request of or for transmittal to Congress or any committee thereof.

The power of an agency to use its information-gathering process on behalf of a congressional committee should not be lightly conferred or implied. The criteria for valid exercise of congressional powers of compulsory process and the rights of parties summoned to produce information before congressional committees are quite different from the correlative powers and rights in relation to administrative procedures. See, *e.g., United States* v. *Tobin,* 195 F. Supp. 598 (D.C. 1961), rev'd and rehearing *en banc* denied *sub nom., Tobin* v. *United States,* 113 App. D.C. 110, 306 F. 2d 270, 274-6, cert. denied *sub nom., United States* v. *Tobin,* 371 U.S. 902 (1962). Congressional committees should not be permitted to circumvent the appropriate limitations upon their fact-gathering powers by inducing regulatory agencies to become their intelligence agents. By the same token, agencies should not be permitted to curry favor with Congress, at the expense of the regulated parties, by lending their facilities to the scheme of circumvention.

Not only does the Order fail to state any purpose; it can have no lawful purpose at all.

IV. Regarding the Burden of Compliance with the Commission's Order

We have not stressed, in our argument, the burdensome nature of the order's demands. In passing we refer to the large number of rates established by the Conference and the large number of merchants with whom it has regular contractual relations (R. 44). We also mention the inherent difficulties in reconstructing telephone conversations which have been conducted over a 6 month period and preparing an accurate memorandum of them. We mention these matters only in passing because in *Montship Lines* the court below, having held the order invalid for failure to state a purpose, commented that it was not necessary to pass upon the contentions there regarding the oppressive and burdensome nature of the demands. The very essence of the decision was that oppression and burden cannot be weighed except on the scale of relevancy to a legitimate purpose. Absent the purpose, the balance cannot be struck.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

New York, N.Y.
November 17, 1964

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,468

FAR EAST CONFERENCE, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,471

NORTH ATLANTIC BALTIC FREIGHT CONFERENCE, ET AL.,
PETITIONERS,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,475

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE,
ET AL., PETITIONERS,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,477

PACIFIC COAST EUROPEAN CONFERENCE, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,518

FAR EAST CONFERENCE, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

Consolidated Petitions for Review of Orders of the Federal Maritime Commission

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Decided August 20, 1964

Mr. Elkan Turk, Jr., with whom *Mr. Seymour H. Kligler* was on the brief, for petitioner in Nos. 18,468 and 18,518.

Mr. Burton H. White, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Mr. Arthur E. Tarantino* was on the brief, for petitioners in Nos. 18,471 and 18,475.

Mr. Charles F. Warren for petitioner in No. 18,477.

Mr. Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission, with whom Assistant

Attorney General *William H. Orrick, Jr., Messrs. James L. Pimper,* General Counsel, Federal Maritime Commission, and *Irwin A. Seibel,* Attorney, Department of Justice, were on the brief, for respondents.

Before WILBUR K. MILLER, FAHY and WRIGHT, *Circuit Judges.*

FAHY, *Circuit Judge*: Nos. 18,468, 18,471, 18,475 and 18,477 may be considered together. Each case is a petition by one or more steamship Conferences, composed of common carriers by water and organized under agreements approved by the Federal Maritime Commission under Section 15 of the Shipping Act of 1916, as amended, 75 Stat. 763, 46 U.S.C. § 814 (Supp. IV, 1961), to review orders of the Commission issued under the authority the Commission claims by reason of Section 21 of the Act.[1] The orders are not related to any proceeding pending before the Commission on a complaint, but have been issued as part of a

[1] Appeals from similar orders directed to other Conferences and involving different trade routes and commodities were previously filed in the Ninth Circuit. For that reason the Commission contends that this court is required to transfer these proceedings to the Ninth Circuit under 28 U.S.C. § 2112(a). That section provides that when proceedings are instituted in two or more courts of appeals with respect to the same agency order the agency shall file the record in that court in which such proceedings were first instituted and the other courts shall thereupon transfer the proceedings concerning such order to the court in which the record has been filed. We do not think that this section is here applicable; for although the requests for production in the orders involved in these cases and the orders appealed from in the Ninth Circuit are substantially identical, the orders themselves cannot be considered the "same order" within the meaning of the statute. Moreover, assuming that aside from the statute it is within the inherent power of the court to transfer the cases in the interest of sound judicial administration, we do not think that this case is an appropriate one for the exercise of such power since the appeals filed in the Ninth Circuit have already been disposed of by that court.

"Foreign Trade Study" by the Commission. Section 21 authorizes the Commission to

> require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath, whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary,

followed by penalty provisions for non-compliance. 39 Stat. 736 (1916), 46 U.S.C. § 820 (1958).

Only Part I of the orders is involved.[2] It requires each Conference, as agent for its common carrier members, to produce at the Commission's offices in Washington, D. C., as follows:

> a. A copy of any letters, memoranda, circulars, and other correspondence or documents exchanged between the conference and any of its common carrier member lines and/or any of their agents, during the period January 1, 1962 through September 30, 1963, relating to rates on any of the commodities listed in Attachment A hereto. Documents which merely list or state such rates without discussion need not be furnished.
>
> b. A copy of any reports, studies, analyses or

[2] Other parts of the orders as originally issued have been suspended by Commission order of February 26, 1964.

documents compiled by or for or received by the conference between January 1, 1959 and September 30, 1963, with respect to all rates charged by the conference. Documents which merely list or state such rates without discussion need not be furnished.

Whenever any of the foregoing information has been otherwise furnished to the Commission, at the request of the Commission, a statement to that effect identifying the matter filed and the time of such filing, may be submitted in lieu of the matter requested.

This request was preceded by a recitation of the requirements of certain provisions of the Shipping Act[3] and a statement that production of the requested data was necessary "in order that the Commission may be properly informed as to matters bearing upon its responsibilities under these statutory provisions, and to determine what action if any it should take pursuant to such statutory provisions. . . ."

---

[3] This part of the order reads as follows:

Under various provisions of the Shipping Act, 1916, and the Merchant Marine Act, 1936, the Commission is charged with certain regulatory responsibilities with respect to rates and practices of common carriers in the waterborne foreign commerce of the United States.

Section 15 of the Shipping Act, 1916, requires, among other things, that the Commission disapprove, cancel, or modify agreements found to be unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States or to be contrary to the public interest. Section 17 of the Shipping Act, 1916, prohibits common carriers by water in the foreign commerce of the United States from charging rates or fares which are unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign

Accompanying each order was a letter from the Chairman of the Commission stating that certain rates and charges applicable to cargo from certain ports of the United States to certain foreign ports exceeded those applicable to cargo from the foreign ports to ports of the United States, particularly with respect to the commodities listed in Attachment A to the orders; and that the Commission was considering institution of an investigation of the matter pursuant to Section 212(e) of the Merchant Marine Act, 1936, and/or rate proceedings to determine the issue of the detrimental character of the rates within the meaning of Section 18(a)(5) [sic--probably should read "18 (b)(5)"] of the Shipping Act, 1916, as amended. The letter continued,

> Prior to the institution of proceedings pursuant to the aforementioned statutory provisions, and if possible to obviate the necessity therefor, we request that you take immediate steps to make appropriate adjustments in your tariffs, particularly with respect to the rates on the commodities enumerated in Attachment A, or that you submit to the Commission statements setting forth all facts and conditions which explain or justify the higher export rates published by your conference. We

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competitors. Section 18(b)(5) of the Shipping Act, 1916, requires that the Commission disapprove rates found to be so unreasonably high or low as to be detrimental to the commerce of the United States.

Under Section 212(e) of the Merchant Marine Act, 1936, the Commission is required to investigate rates whereby shippers from the United States pay a higher rate from a United States port to a foreign port than the rate charged by the same carrier on similar cargo from such foreign port to such United States port, and to recommend to Congress measures by which such discimination may be corrected.

> request your compliance with the foregoing on or before December 15, 1963. For the purpose of evaluating your statement and determining whether formal proceedings should be instituted, the Commission is also requiring that you furnish the information described in the accompanying order issued pursuant to Section 21 of the Shipping Act, 1916.[4]

The question is whether the orders are valid. We note first the contention, pressed in No. 18,477, that the letter accompanying the order demonstrates that the Commission's purpose was to force a reduction in rates by requiring the Conferences to "reduce or produce", and that such a coercive tactic constitutes an invalid exercise of administrative authority. We can find no such coersive purpose in the combination of the order and the letter since, as we view the matter, the information requested was to be supplied whether or not the letter itself led to the rate adjustments suggested. We have the question whether the orders are valid, not the letters. We cannot hold the orders invalid if, considered apart from the letters, they are within the Commission's authority. *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 145 (1937).

As to this we bear in mind the broad regulatory responsibilities of the Commission, considered with the exemption enjoyed by the Conferences from the

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[4] By orders of March 12, 1964, March 20, 1964, and April 22, 1964, this court denied the applications of petitioners for interlocutory injunctions restraining enforcement of the Commission's orders pending final determination of the petitions to review. The orders of March 12 also dissolved orders previously entered by this court staying the effectiveness of the Commission's orders in Nos. 18,468 and 18,471.

antitrust laws by reason of Commission approval of Conference agreements. See *Isbrandtsen Co.* v. *United States,* 93 U.S. App. D.C. 293, 297, 211 F.2d 51, 55, *cert. denied, Federal Maritime Board* v. *United States,* 347 U.S. 990 (1954). Within these broad responsibilities is lodged the specific authority here sought to be exercised. As to this we cannot accept petitioners' suggestion that Section 21 orders must be limited to complaint proceedings. They are available to aid investigation without the need for the support of a charge of violation of the Act, or belief even that such a violation is probable. *Isbrandtsen-Moller Co.* v. *United States, supra* at 144. In this respect the discussion by the Supreme Court in *United States* v. *Morton Salt Co.,* 338 U.S. 632, 652 (1950), is applicable, though that case involved the investigatory powers of the Federal Trade Commission and not of the Maritime Commission. And see *Pacific Westbound Conf.* v. *United States,* — F.2d — (9th Cir. 1964). *Cf. Montship Lines, Ltd.* v. *Federal Maritime Board,* 111 U.S. App. D.C. 160, 166, 295 F.2d 147, 153 (1961).

We need not discuss whether or not the data demanded, if the demand is otherwise valid, is of the type obtainable under Section 21, namely, "any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act"; for petitioners accept the view of the Commission in this respect. At least they do not dispute it in these cases, no doubt in part because of the views expressed by this court in *Montship, supra,* as to the broad construction to be

given the enumeration in Section 21 of the kind of data the Commission may require.[5]

There is a contention, however, that a Conference is not an entity to which a Section 21 order may be applied. That section is applicable to "any common carrier by water" or "other person subject to this Act," or "any officer, receiver, trustee, lessee, agent or employee" thereof. The fact is that the Conferences are in many respects agents of the carriers which compose them. If the Conferences are in possession of the data, and the data is otherwise validly sought, it may not be refused on the theory the Conferences are not answerable to a Section 21 order.

Petitioners also contend that the orders are invalid because the data sought is not reasonably related to the Commission's statutory authority over rates in foreign commerce. They claim that the Commission's only source of control over such rates is Section 18(b)(5) which requires Commission disapproval of rates found "to be so unreasonably high or low as to be detrimental to the commerce of the United States," and under this limited statutory authority the Commission is concerned only with the effect of rates, not with the rate-making processes to which the requested data relates. As we read the statute, however, the Commission's concern is not solely with the detrimental effect of rates on the commerce of the United States but also with the reasonableness of rates, to which the information sought is related. We have in mind also the command of Section 212(e) which di-

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[5] Petitioners, however, do contend that an order "to produce" is not authorized by Section 21 since that section literally requires a carrier only "to file" the requested data. Whatever the difference between producing and filing, we think this contention was disposed of by this court's opinion in *Montship, supra*.

rects the Commission to investigate disparities between import and export rates and to recommend to Congress measures by which such discrimination may be corrected.

A principal argument of petitioners is based on the decisions of this court in the *Montship* case, and in *Hellenic Lines, Ltd.* v. *Federal Maritime Board,* 111 U.S. App.D.C. 151, 295 F.2d 138 (1961), which held the Section 21 orders then before the court to be invalid because they were set forth in such general terms that no standard existed by which to determine the relevancy of the information demanded, a defect which bore upon the reasonableness of the orders. Here, however, the purposes are set forth with reference to particular sections of the statute and the need of the Commission for the information in order "that the Commission may be properly informed as to the matters bearing upon" the responsibilities imposed upon it by the sections thus referred to. This is clearly an effort by the Commission to meet the defect pointed out in our *Montship* and *Hellenic Lines* decisions, and, like the Ninth Circuit in its recent decision in *Pacific Westbound,* we think the effort has succeeded and that the stated purposes of the order show the relevancy of the data sought. The requirements to be met in the investigatory area of administrative agencies, stated in general terms in the *Morton Salt* case, seem to us to be satisfied in this case:

> [I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 338 U.S. 632, 652.

A word now as to the possible oppressiveness of the demand to produce, that is, the difficulty of compliance

in relation to the need of the Commission to obtain the information. We have no basis in the record for finding oppressiveness. We rely upon the prudence and reasonableness of the Commission in cooperating with the Conferences in the manner of complying. *Cf. United States* v. *Morton Salt Co., supra* at 653.

No. 18,518. Aside from matters above disposed of, in this case Far East Conference challenges a Section 21 order demanding the data which is described in the copy of the order which is set forth as an Appendix to this opinion. As appears therefrom the data demanded relates to requests and complaints of shippers. Section 15 of the Shipping Act of 1916 was amended in 1961, 75 Stat. 764, 46 U.S.C. § 814 (Supp. IV, 1961), by adding a provision as follows:

> The Commission shall disapprove any such [Section 15] agreement, after notice and hearing, on a finding of . . . failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

The order recites that the Commission needs the data sought so as to be adequately informed as to matters bearing upon its responsibilities under this statutory provision. The objection of petitioner is that the statute vests authority in the Commission with respect to reasonable procedures for hearing and considering shippers' requests and complaints, whereas the order seeks data not as to procedures but as to requests and complaints made, and action taken in connection therewith. But it seems quite clear to us that the Commission in ascertaining whether or not the Conference has adopted and is maintaining reasonable procedures respecting requests and complaints of

shippers is entitled to find out what requests and complaints have been made and what disposition has been made of them. The information requested is designed to inform the Commission as to this.

In all the cases we have not neglected to consider Section 6(b) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. § 1005(b) (1958), limiting an agency in demanding reports and making investigations except as the agency may be authorized by law. Being of opinion that the orders are authorized by law, it follows we find Section 6(b) no bar to them.

Affirmed.

Circuit Judge WILBUR K. MILLER dissents.

APPENDIX

Section 21 Order

STUDY—CONFERENCE PROCEDURES FOR HEARING AND CONSIDERING SHIPPERS' REQUESTS AND COMPLAINTS

Section 15 of the Shipping Act, 1916, requires, among other things that the Commission disapprove any agreement between parties subject to that Act on a finding of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

In order that the Commission may be adequately informed as to matters bearing upon its responsibilities under this statutory provision, and to determine what action, if any, it should take under this provision, it is necessary that the conference named herein furnish the Commission with the information hereinafter specified.

Now THEREFORE, pursuant to the authority vested in it under Section 21 of the Shipping Act, 1916, the Commission hereby orders THE FAR EAST CONFERENCE (Agreement No. 17), as agent for each of the member lines thereof, to produce at the Commission's offices in Washington, D. C., not later than January 22, 1964 the following:

1. A copy, or if oral, a complete statement of each request and/or complaint filed during the period July 1, 1963 to December 31, 1963, inclusive.

2. Copies of all interim correspondence and memoranda including all inter-office memoranda and correspondence between the conference and carriers and any report or studies pertaining to each individual request and/or complaint mentioned in Paragraph 1 above.

3. A copy, or if oral, a complete statement of each notice to shippers advising of actions taken in connection with such requests and complaints.

4. A brief resume to accompany the above setting forth the date received, the name and address of the party, the nature of the request or complaint, the date of disposition, the method of disposition, and if denied, the reason for such denial.

Whenever any of the foregoing information has been otherwise furnished to the Commission, at the request of the Commission, a statement to that effect, identifying the matter filed and the time of such filing, may be submitted in lieu of the matter requested.

By Commission December 27, 1963

Francis C. Hurney
for Thomas Lisi
Secretary

APPENDIX B

Constitutional and Statutory Provisions Involved

I. Amendment IV to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II. Sec. 15, Shipping Act, 1916, 39 Stat. 733, as amended by 75 Stat. 763 (46 U. S. C. §814):

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner

providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable

procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

III. Sec. 21, Shipping Act, 1916, 39 Stat. 736 (46 U. S. C. §820):

That the board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

IV. Sec. 2 of the Judicial Review Act (Federal Agencies), 64 Stat. 1129, as amended (5 U. S. C. §1032):

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402(a) of the Communications Act of 1934, as amended, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 309(e) and 317 of the Packers and Stockyards Act and section 7(a) of the Perishable Agricultural Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercostal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended, and (d) of the Atomic Energy Commission made reviewable by section 189 of the Atomic Energy Act of 1954, as amended.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

V. Sec. 4 of the Judicial Review Act (Federal Agencies), 64 Stat. 1130 (5 U. S. C. §1034):

Any party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof lies, a petition to review such order. Upon the entry of such an order,

notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

VI. Sec. 10 of the Judicial Review Act (Federal Agencies), 64 Stat. 1132, (5 U.S.C. §1040):

An order granting or denying an interlocutory injunction under section 1039(b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254(1) of Title 28: Provided, That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254(1) of Title 28: Provided further, That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254(3) of

Title 28, regarding certification, and of section 2101(e) of Title 28, regarding stays, shall also apply to proceedings under this chapter.

VII. Sec. 6(b) of the Administrative Procedure Act, 60 Stat. 240 (5 U. S. C. §1005):

(b) INVESTIGATIONS—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

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